

Christopher C. Voigt
Matthew S. Brahana
CROWLEY FLECK PLLP
500 Transwestern Plaza II
490 North 31st Street
P. O. Box 2529
Billings, MT 59103-2529
Telephone: (406) 252-3441
Facsimile: (406) 256-8526
E-Mail: cvoigt@crowleyfleck.com
E-Mail: mbrahana@crowleyfleck.com

Roy H. Andes
432 N. Last Chance Gulch, Suite J
P.O. Box 2529
Helena MT 59624
Telephone: (406) 447-4214
Facsimile: (406) 442-8293
E-Mail: rhandes@earthlink.net

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

INTERSTATE POWER SYSTEMS, INC.,

Plaintiff,

vs.

DRAKE WATER TECHNOLOGIES, LLC, DRAKE
ENGINEERING, INC., RON
DRAKE and VIVIAN DRAKE,

Defendants.

)
)
)
)
)
)
)
)
)
)

Cause No. 08-CV-128D

**Memorandum Supporting
Defendant DWT's Motion for
Attorney Fees**

As the Court noted on rendition of the jury's verdict, this case should have been settled, not tried. This was a breach-of-contract case that became unnecessarily complicated by plaintiff's wide-ranging allegations of torts and other theories, and by plaintiff's litigation tactics calculated

to frustrate even modest litigation tasks. Plaintiff's conduct necessitated the fullest of defenses, significantly increasing the time and costs of defense. According to the terms of the contract, defendant DWT must be awarded its fees and costs as the prevailing party under Montana law.

Factual Background

By now, the Court is acutely familiar with the facts of this case. The following facts, focused on attorney fees, supplement the Court's already extensive knowledge.

On filing this lawsuit on May 16, 2008, plaintiff Interstate Power Systems, Inc. (Interstate) sought to terminate its license agreement with DWT, and unilaterally ceased all performance of the agreement.¹ Thereupon, *both* parties gave notice of contract termination.² However, despite plain contract language, Interstate thereafter claimed, and vigorously clung to, an ongoing license in the Drake Process, alleging,

Interstate owns the right to what the defendants refer to as the "Drake Process," which is a mechanical device designed to provide purification, desalinization, or other treatment of the water produced from coal bed methane or coal bed natural gas wells. Interstate now owns the right to manufacture and sell this technology in Wyoming and Montana ("the Drake Process").

Complaint, Dkt. 1, pp.1-2.; *compare*, Dkt. 1, count 1 (p. 10), counts 3 & 4 (pp. 11-12).

Because of Interstate's contradictory claims, DWT was compelled to exert massive litigation efforts to sever the issue of the intellectual property license from the other issues in the case, and to seek termination of the license. DWT eventually achieved both. Multiple times before, DWT had made overtures to secure termination of the license, under paragraph 8.5.3 of the agreement.³ But none of those efforts bore fruit until entry of final judgment, just days ago.

¹See, recital of Interstate's contract termination events at Dkt. 160, p.3.

²Dkt. 50-26, letter-Henderson to Andes, 5/16/2008, p.1 para. 1; p. 2 last para.; Dkt. 50-27, "Notice of Termination of Agreement," 5/20/2008.

³Providing,

8.5 Early Termination Rights. In the event of early termination of this Agreement: ...

8.5.3 All other licenses granted to IPS hereunder shall be immediately terminated and shall

(continued...)

Thus, DWT was forced to defend this entire lawsuit in order to achieve success with its central objective— the freeing of its intellectual property from claims by Interstate.⁴

DWT first sought to sever the license from the other litigation issues in its very first response to Interstate's lawsuit. In reply to Mr. Henderson's May 16 letter, DWT offered to waive the mediation provisions of the contract if Interstate would waive its claim to the license.⁵ Interstate refused.⁶

Next, DWT tried to resolve the license issue through its Montana lawsuit. The Montana case was filed in July, 2008 after Interstate had failed to serve or otherwise prosecute this federal case for two months.⁷ When Interstate failed to timely appear in the Montana case, DWT entered Interstate's default.⁸ However, DWT offered *to set aside* the default, *excepting only* DWT's claim that the license was terminated.⁹ Again, Interstate resisted this reasonable proposal, fighting vigorously to keep its claim to the license.¹⁰

Still later, after Gordon Galarneau testified in deposition that he wanted only to terminate the agreement and the license, DWT tried again by letter to persuade Interstate to release its claim

³(...continued)

immediately revert to DWT. Termination of this Agreement shall not preclude either party from claiming any other damages, compensation or relief that it may be entitled to upon such termination.

Agreement, Dkt. 50-7, at 10.

⁴*See*, Answer and Counterclaim, "Nature of the Case," Dkt. 14, p.12 of 23.

⁵Letter: Andes to Henderson, May 20, 2008, p.2, 1st para. (Dkt. 23-5, page 5 of 23).

⁶Affidavit of Roy Andes, Oct. 10, 2008, ¶13, Dkt. 23, p. 5 of 8.

⁷Affidavit of Roy Andes, Oct. 10, 2008, ¶¶14-20, Dkt. 23, pp. 5-7 of 8; Complaint and Jury Request, Mont. 13th Jud. Dist., DV 08-1044 (Dkt. 13-2); *See*, Letter: Andes to Henderson, July 21, 2008 (Dkt. 23-5, pp. 20 & 21 of 23).

⁸Affidavit of Roy Andes, Oct. 10, 2008, ¶21, Dkt. 23, p. 7 of 8.

⁹Plaintiff's Consent to Partially Set Aside Default, Mont. 13th Jud. Dist., DV 08-1044 , Sept. 12, 2008 (Exhibit B to Affidavit of Roy Andes, September 10, 2009, filed herewith).

¹⁰Reply Brief In Support of Motion to Set Aside Default of Interstate Power Systems, Inc., Mont. 13th Jud. Dist., DV 08-1044, Sept. 26, 2008 (Exhibit C to Affidavit of Roy Andes, September 10, 2009, filed herewith).

to the license under paragraph 8.5.3 of the contract.¹¹ Once again, Interstate refused.¹²

Then, in summary judgment, DWT tried a fourth time to sever the license from other claims.¹³ Again, Interstate strenuously resisted.¹⁴ With the Court's denial of DWT's alternative summary judgment motion,¹⁵ the license issue thus went to trial, whose outcome is now settled. With the Court's final judgment, DWT's title to its intellectual property is now successfully quieted in DWT.¹⁶

Although Interstate once proposed a settlement conference before Judge Beaman, the terms of the proposal made clear that Interstate sought the meeting to continue pursuit of an interest in the Drake Process or to otherwise obtain substantial money from the Drakes.¹⁷ Late in the case, at the pretrial conference Mr. McKellar floated a "suggestion" that both parties "walk away" from the litigation. However, Mr. McKellar told Mr. Andes at the time that he did not have authority from Interstate for his proposal. Given the late stage of the case, the lack of authority, and the vague terms, defendants did not agree.¹⁸

Interstate's litigation tactics forced defendants to expend unusually large amounts of resources to defend the case. Starting with Interstate's many legal theories, plaintiff regularly

¹¹Letter Voigt to Henderson & McKellar, Feb. 26, 2009 (Exhibit D to Affidavit of Roy Andes, September 10, 2009, filed herewith).

¹²Letter: Henderson to Voigt & Andes, Apr. 13, 2009, Page 3 of 3, ¶6 (Dkt. 43-15, Page 4 of 4).

¹³Alternative Motion for Partial Summary Judgment by Drake Water Technologies, LLC (Dkt. 48); Brief Supporting Alternative Motion for Partial Summary Judgment by Drake Water Technologies, LLC (Dkt. 49).

¹⁴Plaintiff's Brief in Opposition to Defendant Drake Water Technologies, LLC's Alternative Motion for Partial Summary Judgment (Dkt. 69).

¹⁵Order Granting in Part and Denying in Part the Parties' Cross Motions for Summary Judgment (Dkt. 93), pp. 25-27.

¹⁶Final Judgment (Dkt. 163) pp. 3-5.

¹⁷Email: Henderson/Voigt, Dec. 11, 2008 (Exhibit E to Affidavit of Roy Andes, September 10, 2009, filed herewith); Email: Henderson to Voigt, Dec. 17, 2008 (Dkt. 120-2, Page 14 of 14).

¹⁸The "walk-away" suggestion did not contain any particulars with respect to license termination, confidential information, or accrued attorney fees and costs.

subjected the four defendants to a broad array of unreasonable legal maneuvers. Interstate's conduct included, among others: Insisting at length that plaintiff's owner, Gordon Galarneau, be deposed in Minneapolis rather than in Billings (where he testified at trial he is a legal "resident"), being repeatedly tardy in delivering discovery, issuance of broad third-party subpoenas with improper service, demands to extend the Court's discovery deadlines, a tardy motion to amend Interstate's complaint, failure to provide witness list and exhibits as required at the pretrial conference,¹⁹ and filing eleven last-minute motions in limine. A thorough description of Interstate's litigation conduct and the complexities it created is contained in Docket entries 43, 52, 53, 89, 92, 93-2, 134, and 152.

Legal Discussion

Montana and Wyoming follow the American Rule, by which, without contractual provision or statutory grant, each party in litigation pays its own attorney fees.²⁰ In this case, however, *both parties agree* that the contract provides for attorney fees to the prevailing party. Interstate alleged in Count 9 of its complaint:

The Agreement provides for the payment of attorneys fees and costs to the prevailing party in the event of a dispute between the parties.

Complaint, Dkt. 1, p. 15, ¶72. Likewise, DWT's fifth counterclaim requested Interstate's payment of attorney fees if DWT prevailed. Answer and Counterclaim, Dkt. 14, p.22, ¶¶42-43.

The applicable contract provision is an indemnity clause at paragraph 12.2 of the License Agreement. It provides:

12.2 Mutual Indemnification For Acts or Omissions Or Third Party

Claims. Each party agrees to indemnify, hold harmless and defend the other party, its Affiliates, employees and agents, against any and all claims, *suits, losses, damages, costs, attorneys fees and expenses* resulting from acts or omissions of the other party under this Agreement or with respect to third parties, including, but

¹⁹See, discussion Dkt. 108, pp. 2-6.

²⁰*Transaction Network, Inc. v. Wellington Technologies, Inc.*, ¶22, 2000 MT 223, 301 Mont. 212, 7 P.3d 409 (Mont. 2000); *Meyer v. Hatto*, 2008 WY 153, 198 P.3d 552 (Wyo. 2008).

not limited to, any damages, losses or liabilities whatsoever with respect to death or injury to any person and damage to any property arising from the acts or omissions of the other party.

License Agreement, Dkt. 50-7, ¶12.2 (emphasis added). Under Montana law, contract provisions that award attorney fees are binding on the Court.²¹

Though hardly a model of clarity, paragraph 12.2 requires each party to indemnify the other for, *inter alia*, “attorney fees” incurred as a result of its conduct under the agreement. Any other construction would yield absurd results, a forbidden outcome in construing contracts under Montana law.²² Construing ¶12.2 as applying the indemnity only to defense of claims by third parties would render ¶12.2 redundant to ¶12.1, thus depriving ¶12.2 of any meaning in violation of §1-4-101, M.C.A. In addition, this indemnity clause was written by Interstate,²³ so any ambiguities within it must be construed most strongly against Interstate.²⁴ To understand its import, one need look no further than the words of its author, Mr. Henderson, who wrote in Interstate’s Complaint, “The Agreement provides for the payment of attorneys fees and costs to the prevailing party...” Complaint, Dkt. 1, p. 15, ¶72.

This raises the issue of who was the “prevailing party” under the terms of the contract. Under Montana law, a party need not receive a money judgment in order to “prevail.”

No one factor should be considered in determining the prevailing party for the purpose of attorney fees. The party that is awarded a money judgment in a lawsuit is not necessarily the successful or prevailing party.

Doig, 282 Mont. at 112-113, 935 P.2d at 272. Instead, the Court is to determine the prevailing party “based on the totality of circumstances and facts” of the case. *Id.*, 282 Mont. at 113, 935

²¹*Transaction Network*, 2000 MT 223, ¶19, 7 P.3d at 412; *Doig v. Cascaddan*, 282 Mont. 105, 112, 935 P.2d 268, 272 (Mont. 1996).

²²*Lewis v. State Dept. of Revenue*, 207 Mont. 361, 675 P.2d 107, 111-112 (Mont. 1984) (language of royalty contract construed to avoid absurd results); *See, Richards v. JTL Group*, 2009 MT 173, ¶14 (Mont. 2009).

²³“Exclusive Patent License Agreement” (1st draft of License Agreement) Dkt. 67-3, p.14 of 19, ¶11.2 (drafted by L. Henderson: *see*, p.2 of 19 and p. 19 of 19).

²⁴§28-3-206, M.C.A.; *Ophus v. Fritz*, 2000 MT 251 ¶31, 301 Mont. 447, 11 P.3d 1192, 1197 (Mont. 2000); *See, Corporate Air v. Edwards Jet Center*, 2008 MT 283 ¶32, 190 P.3d 1111, 1121 (Mont. 2008).

P.2d at 273. The “totality of circumstances” includes such things as who provoked the litigation and the relative success of the parties’ pleaded claims, etc. *Id.*, 282 Mont. at 113, 935 P.2d at 272.

In the instant case, by any measure, DWT is the prevailing party. Interstate’s complaint alleged eight substantive counts, and damages “in excess of \$1 million.” Every count was lodged “jointly and severally” against four legal entities: DWT, Ron Drake, Vivian Drake, and Drake Engineering, Inc. (DEI).²⁵ Interstate later sought to add “fraudulent inducement” claims against all four defendants, as well.²⁶ DWT was thus forced to defend a total of 36 claims by Interstate, fighting many of them all the way through Rule 50 motions.

At trial, Interstate abandoned two of its counts entirely. With the key witness from Bill Barrett Corp. on the stand, Interstate never even inquired about its tortious interference claim. Interstate never produced evidence of damages “in excess of \$1 million.” And the jury awarded Interstate no damages at all.

In the end, defendants prevailed as a matter of law on 35 of Interstate’s 36 claims, dismissed either by stipulation or on motion to the Court. On the single remaining claim –breach of contract– both parties were found in breach, and the jury awarded no damages.

For their part, Defendants filed four substantive counterclaims. DWT requested no relief on its third counterclaim (injunctive relief).²⁷ DWT’s breach of contract claim produced a draw, as the jury found both parties breached the contract, but awarded neither party damages. And, in its final judgment, the Court granted DWT *complete* relief on Counterclaims Two and Four.

Viewed in totality, therefore, DWT was the prevailing party in this litigation. Interstate lost all of its claims but one, which produced a mere draw. DWT prevailed *completely* on two of its four claims. Most importantly, the two claims on which DWT prevailed were its most

²⁵Complaint, Dkt. 1, p. 16.

²⁶Plaintiff’s Amended Complaint, Dkt. 77-2, pp. 15-19.

²⁷The relief already granted by the judgment with respect to Counterclaims Two and Four arguably provides the same relief requested in Counterclaim Three.

important ones –freeing of the Drake’s intellectual property.

Defending all the other claims brought by Interstate, however, was the necessary precondition to achieving the relief granted by the Court under Counterclaims Two and Four. Without those efforts, produced in spite of continued and aggressive resistance from Interstate, Defendants would not have achieved the positive results obtained in the final judgment.

Four different times defendant DWT offered and pleaded with Interstate to release its claim to the license in accordance with ¶ 8.5.3 of the agreement. All four offers would have allowed Interstate to continue to prosecute Interstate’s other claims. But, each time, Interstate staunchly refused. Even after the verdict, Interstate sought to obtain “co-equal rights to the technology”– an unmitigated rejection of the provisions of paragraph 8.5.3.²⁸ Having finally achieved its requested relief in the final judgment, as a matter of law, DWT is now entitled to an award of its reasonable “...costs, attorneys fees and expenses resulting from acts or omissions of...” Interstate in litigating this case.

RESPECTFULLY SUBMITTED this 10th day of September, 2009.

CROWLEY FLECK PLLP

ROY H. ANDES, Esq.

By /s/ Christopher C. Voigt

By /s/ Roy H. Andes

500 Transwestern Plaza II
490 North 31st Street
Billings, MT 59103-2529

432 N. Last Chance Gulch, Suite J
P.O. Box 2529
Helena MT 59624

Attorneys for Defendants

²⁸Dkt. 159, at 2.